

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10, SUBREGION 11**

In the matter of:	)	
	)	
DUKE UNIVERSITY,	)	
Employer,	)	
	)	Case No. 10-RC-187957
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION CLC/CTW,	)	
Petitioner.	)	
	)	

**PETITIONER’S RESPONSE TO DUKE UNIVERSITY’S REQUEST FOR  
EXPEDITED REVIEW, STAY OF ELECTION/IMPOUNDMENT OF BALLOTS,  
OR IN THE ALTERNATIVE, REMAND TO THE REGIONAL DIRECTOR**

Petitioner, Service Employees International Union (“SEIU”), submits this brief in response to Duke University’s (“Duke” or “Employer”) request for expedited review of the Regional Director’s determinations regarding voter eligibility and the conducting of an election by mail ballot. Duke’s request was filed just four days prior to the scheduled mailing of ballots, two weeks after the Regional Director’s Decision and Direction of Election (“DDE”), and nearly eight weeks after the Regional Director declined to litigate questions of election mechanics and rejected Duke’s offer of proof as to voter eligibility. The Regional Director’s determinations, however, comply with all Board procedures and his voter eligibility formula and direction of election by mail ballot election are supported by ample evidence from the record. Therefore, the National Labor Relations Board (“the Board”) should deny Duke’s Request for Expedited Review, Stay of the Election/ Impounding of the Ballots, or in the Alternative, Remand to the Regional Director.

## **I. Procedural History.**

On November 10, 2016, Duke University graduate assistants filed a petition for an election with SEIU. A hearing was held from November 28, 2016 through December 7, 2016 on whether the petitioned-for graduate students are employees under Section 2(3) of the National Labor Relations Act (“the Act”). On the first day of hearing, the Hearing Officer solicited the parties’ positions on voter eligibility and election mechanics. Tr. p. 72. With respect to voter eligibility, SEIU requested a formula with a one-year look-back period for employees in all departments, while Duke asserted that the “standard formula” (payroll eligibility) was necessary. Tr. p. 64. Regarding election mechanics, SEIU requested a mail ballot, while Duke requested a manual ballot.

The eight-day hearing generated a voluminous record exploring the nature of students’ employment relationships with the University. Duke presented testimony from the Dean of the Graduate School, the Director of Graduate Studies for Biomedical Engineering, the Associate Dean of Research Training for the Medical School, and the Chief Financial Officer and Associate Dean for Finance and Administration, and introduced hundreds of pages of documentary exhibits. SEIU presented testimony from four student workers and one faculty member, along with its own submission of hundreds of pages of documentary exhibits. The parties’ exhibits included school and department manuals setting forth practices and policies regarding Duke’s Graduate School and various PhD programs. See e.g., Er. Exs. 5, 9, 16, 19, 27; Pet. Ex. 17.

On the final day of the hearing, after the close of evidence, Duke requested that the Regional Director permit it to litigate the question of election mechanics and the appropriate

voter eligibility formula. Tr. pp. 1181-82. The Regional Director declined to permit the litigation of election mechanics, as that is a non-litigable issue. Tr. p. 1205. The Regional Director also believed there was sufficient evidence in the record to inform a determination on voter eligibility. Id. (“With regard to the second issue involving the eligibility formula, the witnesses have already provided some information that covers the issues on this point.”); Tr. p. 1121 (“[W]e’ve had witness testimony from both parties’ witnesses with regard to specific periods in which students serve or have served in roles providing research or teaching services or expected to serve or not serve in those roles providing research or teaching services.”). Nevertheless, the Regional Director requested that Duke submit a written or oral offer of proof as to voter eligibility. Tr. pp. 1184, 1205.

Duke declined to make a written offer of proof, and instead provided an oral offer of proof as to both voter eligibility and election mechanics. Tr. p. 1184; Tr. pp. 1217-1218 (Hearing Officer Dunn: “So just to be clear, the information that you provided, was that your offer of proof, or you’re asking for an adjournment so that you can provide an offer of proof?” Mr. Conrad: “That was my offer of proof.”). Duke’s oral offer of proof on mail ballot indicated that it would call witnesses to testify on mailing of earning statements, medical bills, and parking passes. Tr. p. 1188. The offer of proof regarding voter eligibility was even more vague with Duke stating it “would really be able to get into the nitty-gritty and demonstrate through charts, other demonstrative exhibits, and testimony, the frequency with which students repeat, as either teaching assistants or research assistants.” Tr. pp. 1215-16. The Regional Director subsequently rejected both offers of proof, finding that election mechanics were a non-litigable issues and that Duke’s offer of proof regarding voter eligibility failed to describe the evidence to be introduced

with the specificity required by the Board's Rules and Regulations. Tr. pp. 1205, 1222. Duke did not appeal the Regional Director's decision.

On January 18, 2017, the Regional Director issued a decision holding that Duke PhD students providing instructional and/or research services are statutory employees under *Columbia University*, 364 NLRB No. 90 (2016) and directing an election by mail ballots starting January 31, 2017.<sup>1</sup> The Regional Director also adopted a voter eligibility formula including all unit employees who “1) [r]eceive a twelve month stipend and hold a unit position during the Spring 2017 semester, and/or 2) [r]eceive a nine-month stipend and hold or have held a unit position during the Spring 2016, Fall 2016 or Spring 2017 semesters.” DDE at 35. The Regional Director therefore adopted the Employer's eligibility position as to employees on twelve-month contracts, and SEIU's position as to employees on nine-month contracts.

On January 20, 2017, Duke requested a five-day extension of time to provide the full voter list, and thus also a delay of the election. Duke justified its extension request in part on the need to compile information for voters encompassed by the look-back period in the Regional Director's voter eligibility formula. Duke's request did not challenge the Regional Director's decision on eligibility or election mechanics. The extension request was granted and the election was rescheduled so that ballots are to be mailed on February 3, 2017.

At 7:14 p.m. EST, January 30, 2017, less than four days before the mailing of ballots, Duke filed the request for expedited review currently before the Board.

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<sup>1</sup> The unit includes: All PhD students in Duke University departments housed at its campuses in Durham and Beaufort, North Carolina, who are working toward PhD degrees offered by the Duke Graduate School and who are employed by Duke University to provide instructional services in undergraduate or graduate-level courses or labs (including, but not limited to, Teaching Assistants, Graduate Assistants, Instructors, and Graders) or to provide research services (including but not limited to Research Assistants and Graduate Assistants).

## **II. The Regional Director Correctly Adopted A Voter Eligibility Formula Supported By Substantial Evidence In Accordance With Board Procedure.**

### **A. Substantial Evidence Supports the Regional Director's Decisions Regarding Voter Eligibility.**

To determine voter eligibility, the Regional Director must “strike a balance between the need for an ongoing connection with a unit and concern over disenfranchising voters who have a continuing interest notwithstanding their short-term, sporadic, or intermittent employment.”

*Columbia University*, 364 NLRB No. 90 at 22. The Board has historically approved or directed the use of voting formulas that deviate from the traditional “current payroll” eligibility in industries with atypical hiring and layoff practices.

“An election necessarily occurs at a single moment in an employer's otherwise fluid work force history.” *Steiny & Co.*, 308 NLRB 1323, 1325 (1992). Thus, “[a] formula serves as an easily ascertainable, short-hand, and predictable method of enabling the Board expeditiously to determine eligibility by adopting ‘a period of time which will likely insure eligibility to the greatest possible number of employees having a direct and substantial interest in the choice of representatives.’” *Id.* at 1325-26 (quoting *Alabama Drydock Co.*, 5 NLRB 149, 156 (1938); see also, *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992) (“[T]he Board has been flexible in carrying out its responsibility to devise formulas suited to unique conditions in the entertainment industry, as in other specialized industries, to afford employees with a continuing interest in employment the optimum opportunity for meaningful representation.”).

“[T]he unique circumstances of student assistants’ employment manifestly raise potential voter eligibility issues.” *Columbia University*, 364 NLRB No. 90 at 21. Accordingly, the Regional Director here devised a mixed voter eligibility formula based on whether student assistants were subject to intermittent employment. First, the Regional Director agreed with

Duke that no look-back period is necessary for laboratory research assistants receiving twelve-month stipends. In reaching this conclusion, the Regional Director found that the work performed by lab research assistants is so directly related to their dissertations that they must serve as research assistants every semester to fulfill their degree requirements.

Second, the Regional Director adopted a one-year look-back formula for student assistants receiving nine-month stipends, consistent with the Union's position. This formula is supported by significant evidence in the record demonstrating that Duke graduate students receiving nine-month stipends often are required to accept semester-long work assignments, but do not do so every semester. See, e.g., Tr. p. 1281 (students are generally relieved of teaching or research assistant responsibilities for periods in which they are able to obtain an external fellowship); Tr. pp. 765-66 ("the [Religious Studies] department has given the option that within Years 2 through 5, you can take off one year [from teaching assistant duties] without having your stipend reduced."); Tr. pp. 932-36 (Testimony of Scott Muir describing personal practice of not accepting teaching assistantship positions during certain semesters and resuming them in subsequent semesters); Tr. pp. 965-66 ("at some point during the Years 3 through 5 a student may elect to not teach."); Tr. p. 993-94 ("In years 2 through 5, so that's the eight semesters in years 2 through 5, we are required to teach for six of those eight semesters.").

In addition to being consistent with the factual record, the Regional Director's eligibility formula is supported by Board precedent. The Regional Director considered the voter eligibility formula applied in *Columbia University*, which included students who have held a unit position for the previous academic year.<sup>2</sup> Similarly, the Regional Director relied on well-established

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<sup>2</sup> Duke's argument that the Board should remand this case for further hearing on voter eligibility like it did in *Columbia University* is misguided. The issue of voter eligibility was never decided in the Regional Director's initial decision in *Columbia University* because the petition was dismissed. Here, the Regional Director has already considered evidence on voter eligibility

Board law encouraging the use of voter eligibility formulas in industries with atypical hiring and layoff practices. See e.g., *Steiny & Co.*, 308 NLRB at 1326; *Trump Taj Mahal Casino Resort*, 306 NLRB at 296. Duke's request therefore does not demonstrate that conducting an expedited review is necessary.

B. Duke's Allegations of Procedural Deficiencies Are Meritless.

In its request for review, Duke erroneously claims that the Regional Director's approach to litigating voter eligibility contravenes Board procedure. This is not the case.

Representation Case procedures provide that "[i]f a party contends that a different eligibility formula than standard must be used, this matter must be addressed before the election." General Counsel, *Guidance Memorandum on Representation Case Procedure Changes Effective, April 14, 2015*, ("Memorandum GC 15-06"), p. 17. Regional Directors are expressly permitted to solicit offers of proof from parties as to "any or all" issues that could be litigated at a pre-election hearing, Board Rules and Regulations ("R&R") § 102.66(c), necessarily including questions of voter eligibility. Offers of proof are "tools to focus and define issues and provide a foundation to accept or exclude evidence." Memorandum GC 15-06, p. 21. "If the regional director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received." R&R § 102.66(c). This practice is consistent with Board precedent requiring that "in order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute." *Bennett Industries*, 313 NLRB 1363, 1363 (1994).

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developed in the extensive factual record, considered and appropriately rejected Duke's offer of proof on the issue, and determined an appropriate formula given the evidence in the record.

In this case, the Regional Director acted in accordance with Board Rules and Regulations. The issue of voter eligibility was addressed prior to the election. Parties were solicited for their positions on voter eligibility. A voluminous record was developed addressing student workers' relationship with Duke. When Duke sought to reopen the hearing to introduce additional evidence in support of its desired eligibility formula, the Regional Director indicated he believed the extensive existing record provided sufficient evidence to inform a proper formula, but nevertheless allowed Duke to make an offer of proof under Rule 102.66(c).

Duke declined the Region's invitation to submit a written offer of proof, and instead submitted an oral offer of proof. The oral offer of proof was facially deficient, completely failing to "identify[] each witness [it] would call to testify concerning the issue and summariz[e] each witness's testimony," as required by Board Rules and Regulations section 102.66(c). The Regional Director appropriately rejected the offer of proof as insufficient to support Duke's position, and therefore declined to accept any additional evidence. This procedure is exactly what is contemplated in the Board's Rules.

Duke chose not to appeal the Regional Director's rejection of its offer of proof, but now seeks "expedited review" of the Regional Director's ultimate decision and direction of election. The request fails to identify any specific evidence it was prevented from introducing at hearing that would have changed the Regional Director's ultimate decision. Instead, the request for review makes the same general assertion advanced in Duke's oral offer of proof: that there are variations between departments and that the Regional Director's formula is therefore imperfect. The Regional Director properly found that these vague assertions were insufficient to warrant the acceptance of additional evidence as to voter eligibility. They are certainly insufficient to warrant the extraordinary relief requested by Duke in this request.



The Regional Director appropriately addressed the issue of voter eligibility at the pre-election hearing, and devised a formula with ample support in the record. If Duke had additional evidence it wished to present regarding that issue, it should have submitted an offer of proof that complied with Rule 102.66(c). It cannot now use its own failure to comply with the rules to justify the relief it seeks.

### **III. The Regional Director Did Not Abuse His Discretion in Directing that the Election Be Conducted by Mail Ballot.**

#### **A. The Regional Director Properly Concluded that a Mail Ballot is More Appropriate in This Case.**

Regional Directors have “discretion in determining the arrangements for an election, including the location of the election and whether it should be conducted by manual balloting or mail ballot.” *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). Mail balloting must be considered in any “circumstance[] that would tend to make it difficult for eligible employees to vote in a manual election,” and where voting by mail “would enhance the opportunities for all to vote.” *Id.* A mail ballot may be directed even when manual balloting “might be possible, but would be impracticable, or not easily done.” *Id.* at 1145 n.6 (emphasis added). A mail ballot is normally appropriate “where employees are scattered because of their job duties in terms of geography and/or varied work schedules so that all employees cannot be present at a common place and at a common time to vote manually.” *GPS Terminal Services*, 326 NLRB 839 (1998).

The NLRB Casehandling Manual instructs Regional Directors to consider first whether employees “work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules.” *Id.* at § 11301.2. If any of these situations exist, Regional Directors then consider (1) “the desire of all the parties;” (2) “the likely ability of voters to read and understand mail ballots and the

availability of addresses for employees;” and (3) the “efficient use of the Agency’s financial resources.” *Id.*; see also *GPS Terminal Services, Inc.*, 326 NLRB 839. Based on these considerations, mail balloting has become the norm in higher education instructional worker elections,<sup>3</sup> and is being used for graduate student workers at Loyola University Chicago, Case No. 13-RC-189548 (Jan. 9, 2017).

In line with these standards, the Regional Director here properly concluded that a mail ballot election is more appropriate because the 1,600-2,000 Duke graduate student workers who will vote lack a set work schedule or location. Consonant with *San Diego Gas & Electric* and the Casehandling Manual, the Regional Director determined that the schedules and work locations of the graduate student workers are not merely scattered, but are apparently “not readily ascertainable.” DDE at 31.<sup>4</sup>

The evidence is abundant that the work locations of Duke graduate students are geographically dispersed. Duke has 90 academic buildings across six different campuses, including one campus that is 180 miles from the rest. Duke could not establish that these buildings or campuses are where graduate students’ work must be, or actually is, performed. Nor could Duke provide the work location for any particular graduate student. In fact, several witnesses indicated how work can be performed remotely. Moreover, PhD students can conduct research work away from Duke’s campuses, outside of North Carolina or even the country.<sup>5</sup>

The geographic diffusion is intensified when including eligible voters not currently

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<sup>3</sup> In nearly every single one of the approximately 65 SEIU higher education elections involving instructional staff or faculty since 2012, the election has been conducted by mail ballot, whether by stipulation or direction of the Regional Director.

<sup>4</sup> Because the Regional Director substantively applied the standard set forth in *San Diego Gas & Electric*, his failure to specifically identify that case by name is irrelevant.

<sup>5</sup> Duke’s claim that most doctoral students are “based in Durham,” (Duke Br. at 13), is disingenuous because it does not mean that students actually live or work in Durham, North Carolina.

enrolled or assigned teaching or research responsibilities. A student's temporary lack of service obligations makes it possible to conduct long-term research in the field or at other universities. Romance Studies graduate students, for instance, usually spend a year doing research, "often abroad," for the student's dissertation. (Er. Ex. 38, p. 2.)

The scattered nature of graduate student work life extends to schedules. It is undisputed that all eligible voters are not on campus on any given day or days of the week. Duke's Statement of Position listed "varies" as the schedule for every single of the 1,600 bargaining unit employees. This initial description, which was never revised during the hearing, is plainly appropriate. Instructional workers and humanities research assistants do not have to come to campus, and may work remotely on their own schedule.

Duke's schedule of courses, even if taken as an approximation of student worker schedules, demonstrates that the dates, times, length and frequency of classes defy any commonality. Duke offers classes from 8 a.m. to 9:30 p.m., from 60 minutes in length to several hours, for one or more days a week. Laboratory-based graduate students also have variable schedules, as they can have great leeway to determine their own hours so long as their work gets done. As Dr. Nicchitta stated: "Research does not fit a 5-day, 9 to 5 [schedule]." Tr. p. 600.

Duke does not really contest the scattered nature of bargaining unit work as a practical matter.<sup>6</sup> Indeed, as the proponent of manual ballot, Duke has not produced the schedule for a single petitioned-for voter. Duke's Statement of Position admitted that work schedules and

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<sup>6</sup> While Duke claims that graduate student workers are not scattered in terms of scheduling, (Duke Br. at 14), it failed to offer any evidence in support to a temporal commonality. Duke cites only to page 1103 of the Transcript, which was its *argument* in favor of manual ballot ("This workforce, that's what it is, is no more scattered with respect to when they perform their services than the workforce in any operation that may be 24/7, a three-shift operation, 7 days a week. We have people that are working at different times of the day on different days of the week."). Even disregarding this conjecture as self-serving, Duke still could not identify when and where a single graduate student works.

locations of graduate student workers vary. Subsequently, Duke never provided any information or evidence that graduate student employees “are present at a common place and at a common time to vote manually.” *GPS Terminal Services*, 326 NLRB 839. The scattered status of the voting employees due to their staggered work schedules is sufficient by itself to support a mail ballot election. As the Board noted, “all other pertinent considerations are secondary.” *Allied Waste Services of North America, LLC*, 20-RC-133841, 2014 WL 4734601, at 1\* n.1 (NLRB 2014). Accordingly, the Regional Director plainly did not abuse his discretion in directing a mail ballot election.

**B. The Regional Director Properly Rejected a Manual Ballot.**

The Regional Director properly rejected a manual ballot election because it would be infeasible and would waste limited resources of the Region. Duke’s manual ballot proposal necessitated multiple simultaneous polling places on multiple days. When multiple voting locations are used, the employer must “provide separate lists for each such polling place.” Casehandling Manual § 1302.2(a). The Regional Director correctly noted that Duke provided “little in the way of information as to how many students would be voting at particular locations if the election were to be conducted manually, [and] which students would be voting at particular locations (information necessary to avoid potential duplicative voting or a large number of challenges should students not vote at their assigned polling area).” DDE at 31.

As Duke did not provide a list of voting locations for particular students or how many graduate students would vote at any of the several proposed locations, a manual ballot was plainly infeasible for 1,600-2,000 voters at multiple locations without this information. The Regional Director was right to be skeptical about a process that requires a “massive undertaking and a situation ripe for confusion and problems.” *Beaverbrook STEP, Inc.*, Case No. 01-RC-

080321 (May 31, 2012) (citing *Sutter Bay Hospital*, 357 NLRB No. 21 (2011); *Reynolds Wheels International*, 323 NLRB 1062 (1997)).<sup>7</sup>

A manual ballot clearly drains limited agency resources. The Regional Director noted that a minimally-effective manual ballot at Duke requires at least four polling locations for at least 14 hours each day over two to three days. That requires at least 170 hours of agency hours, not including travel time to and from Winston-Salem. See *Masiongale Electrical-Mechanical, Inc.*, 326 NLRB 493, 493 (1998) (mail ballot permitted where “[a]gents would be required to travel a significant number of miles and possibly conduct the election on more than 1 day.”); *United Maintenance Co.*, 13-RC-106926, 2013 WL 4855389 (NLRB 2013) (mail ballot justified where manual election would require multiple voting sessions at three locations with at least two translators at each location). And yet, a manual election, as the Regional Director noted, would be still leave enfranchisement “too much to chance,” given the uncertain and variable schedules and locations of eligible voters. DDE at p. 32.

Because the decision below was based on the scattered and variable work locations and schedules of the bargaining unit, and the significant possibility of confusion and wasted resources presented by a manual ballot, the Regional Director’s ordering of a mail ballot election is plainly appropriate and is not an abuse of discretion.

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<sup>7</sup> The Board can take administrative notice of the difficulties encountered by manual ballot in the still-ongoing Harvard University election involving graduate student employees. The use of multiple voting locations was one reason that the election generated an unusual number of challenged ballots. The vote concluded November 17, 2016, but remains unresolved nearly three months later.

C. The Regional Director Correctly Did Not Permit a Hearing on Election Mechanics.

Duke contends that the Regional Director erred in failing to permit a “fuller record” on election mechanics. Duke Br. at 10. This assertion is incorrect and, in any event, insufficient to establish the Regional Director abused his discretion.

It is well established that parties are not entitled to litigate election mechanics. The Casehandling Manual states in Section 11301.4: “In the event a hearing is held during the course of processing the petition, the Hearing Officer will explore the parties’ positions regarding election arrangements, but parties shall not be permitted to litigate this issue.” (emphasis added). Duke did not cite any authority that compels an evidentiary hearing on the type of ballot for an election, or requiring that a decision on election mechanics be based exclusively on the record of such a hearing.

Because election mechanics are not subject to litigation, Duke was, like the Union, free to submit evidence in support of its position directly to the Regional Director. The Union submitted evidence to the Regional Director before the hearing, which was then given to Duke by the Union during the hearing.<sup>8</sup> Er. Ex. 42. Duke submitted evidence in the form of two affidavits during the hearing, on December 7, 2016. Er. Exs. 39, 40. The Hearing Officer then noted with regard to mechanics issues, “If you wish to present those issues, you may raise those in your brief.” Tr. p. 1205. Duke, despite being represented by multiple attorneys with decades of NLRB experience, failed to take advantage of this opportunity and did not submit any further

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<sup>8</sup> Duke’s attempt to discredit the substance of the Union’s affidavits is absurd. Duke asserts the Mr. Longarino’s affidavit contradicted his testimony “that students in his department are allowed to take a year off from teaching at any point between the students’ second through fifth years of study.” (Duke Mem. P. 10, n.7.) The speciousness of Duke’s assertion is plain to anyone who takes the time to actually read Mr. Longarino’s affidavit, which also unequivocally stated “In my Department, students are allowed to spend one year between their second and fifth year not TAing or RAing.” (Longarino Aff. ¶ 4.)

evidence with its post-hearing brief. If Duke failed to present relevant evidence regarding election mechanics, it has only itself to blame for its predicament.

Despite Duke's hyperbolic arguments, there was nothing improper about the Region's consideration of the Union's pre-hearing affidavits.<sup>9</sup> Duke cannot establish that it was entitled to the affidavits or prejudiced by the Regional Director's consideration of the same. Duke never requested copies of affidavits in the Regional Director's possession during the testimony of witnesses. Duke received SEIU's affidavits prior to the close of hearing just as SEIU received Duke's affidavits. Regardless, the Regional Director did not cite to any pre-hearing affidavit as the basis for any finding in the DDE, let alone to support his decision to direct a mail ballot. There was nothing improper about the Regional Director's adherence to established Board procedures regarding the resolution of election mechanics disputes, and even if there was, Duke has not and cannot show that any prejudice resulted.

D. Duke's Possession of Multiple Mailing Addresses for Students Does Not Render a Mail Ballot Election an Abuse of Discretion.

In opposing a mail ballot election, Duke relied extensively on the fact that it has multiple addresses for many eligible voters. In response, for voters with multiple addresses, the Regional Director sensibly directed Duke to simply use the address it uses on the student's 2016 W-2 form. DDE at 36. Because a W-2 form requires Duke to list an employee's current mailing address, even when the form itself is not provided to the student by mail, use of this address makes perfect sense. Moreover, if this address is incorrect, voters can simply provide the correct address to the Region. DDE at 32.

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<sup>9</sup> Rules 102.67 and 102.68, cited by Duke, are not to the contrary. There is no logical or legal basis in support of Duke's contention that the Regional Director was limited to the hearing's evidentiary record once he solicited the parties' positions about election mechanics. Regional Directors are required to solicit positions on non-litigable issues. Such a solicitation does not represent a *sub silentio* reversal of the longstanding policy that mechanics are not to be litigated.

Similarly, Duke's claim of confusion caused by a mail ballot here is supported by nothing more than "sky is falling" conjecture. There is no evidence to support that Duke's claim that ballots sent to wrong addresses, or requests for duplicate ballots, will occur in problematic numbers or will result in confusion. Duke also argues that voters requesting duplicate ballots may fail to follow directions. This argument simply ignores Duke's own admission that its PhD students will have little difficulty following election instructions. Tr. p. 50. It ignores the fact that Duke was unable to describe any sensible means for assigning individual voters to specific election locations if a manual ballot were to occur, and the much greater risk of confusion that would result from students being assigned to random voting locations across campus.

Because Duke is required to maintain valid addresses for W-2 forms and because PhD student workers are plainly able to follow written instructions for requesting a duplicate ballot if necessary, Duke's possession of more than one mail address for a voter is without significance. The Regional Director's simple solution to the multiple-address problem is plainly not an abuse of discretion.

#### **IV. Duke Failed to Timely Raise Its Current Objections, And Raises Them Now Solely To Further Delay Proceedings.**

Duke has had many opportunities to raise each of the arguments it raises in its current request for review. It was aware that the Regional Director would only entertain documentary evidence regarding election mechanics during the hearing from November 28, 2016 to December 7, 2016, yet sought no relief from the Board at that time. It was also aware that the Regional Director rejected its offer of proof as to voter eligibility on December 7, 2016, but again chose not to appeal that decision. Duke further did not issue any appeal or challenge upon receiving the Regional Director's Decision and Direction of Election on January 18, 2017. Rather, Duke asked only for a delay of the election so that it could compile an accurate voter list in compliance



with the Regional Director's eligibility formula. Duke's request for a delay made no mention of the issues it now claim warrant expedited, extraordinary relief from the Board.

Instead of timely pursuing its rights, Duke sat on its complaints until its request for relief could prove most disruptive to the impending election – less than four days before ballots were to be mailed. The unreasonable timing of Duke's request for review demonstrates that the purported urgency of its requested relief is pure fabrication. It also makes evident that Duke's true goal remains what it has been from the very beginning: delaying and denying its student employees' their right to a union election by any means possible.

### **CONCLUSION**

The Union respectfully requests that the Board deny Duke University's Request for Expedited Review, Stay of Election/Impoundment of Ballots Or, In The Alternative, Remand to the Regional Director.

Respectfully submitted, this the 1st day of February, 2017.

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was filed electronically via the National Labor Relations Board's e-filing service, and was served via e-mail to the following:

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